

United States Senate

SENATE IMPEACHMENT TRIAL COMMITTEE

WASHINGTON, DC 20510-6326

DISPOSITION OF JUDGE G. THOMAS PORTEOUS, JR.'S MOTIONS TO COMPEL AND FOR DEPOSITIONS

Judge G. Thomas Porteous, Jr. filed (1) a Motion to Compel Inspection of Non-Privileged Materials Collected and Maintained by the House of Representatives and (2) a Motion for Authority to Issue or, Alternatively, Assistance in Issuing, Deposition Subpoenas, which requests pretrial depositions of ten potential witnesses. The House has submitted Oppositions to both motions. The Committee hereby denies the Motion to compel and grants in part and denies in part the Motion for depositions.

MOTION TO COMPEL

Judge Porteous alleges that the House is withholding non-privileged documents that are relevant to his defense. He seeks an order compelling production of the documents or a “generalized list” of the categories of withheld documents. In addition, Judge Porteous specifically seeks access to the House Impeachment Task Force’s staff notes, arguing that what appears to be a two-word quotation from a witness interview included in a footnote to the House Judiciary Committee Report waived work product protection with regard to the underlying witness interview notes. The House maintains that it has either provided copies of or access to inspect all non-privileged documents relevant to the four Articles of Impeachment.

Judge Porteous seeks broad access to the files of the House Impeachment Task Force beyond the parameters set out in the Committee’s Disposition of Discovery Issues of June 9, 2010 (“June 9 Discovery Order”). In his Motion for Discovery filed on May 28, 2010, Judge Porteous included requests for witness interview notes taken by Task Force staff and an index of withheld documents. The Committee ruled that the House should produce information “relevant to, or likely to lead to new evidence on, the adopted Articles of Impeachment” but that the House was not required to produce its work product or the requested index.¹

Judge Porteous has neither demonstrated noncompliance by the House with the June 9 Discovery Order nor moved for its reconsideration. The House has provided voluminous material to Judge Porteous and afforded multiple opportunities for his counsel to inspect numerous other documents and request copies. The House represents that it is withholding a few folders of documents that are irrelevant to the Articles of Impeachment. Judge Porteous argues, in effect, that the House should not be determining what must be produced and may be withheld under the Committee’s June 9 Discovery Order. However, in any litigation, the parties bear the affirmative burden of complying with court orders; without concrete evidence of noncompliance or bad faith, the Committee has no cause to intervene. A brief reference to a witness interview

¹ Senate Impeachment Trial Committee, Disposition of Discovery Issues (June 9, 2010).

does not justify removing work product protection for the House's staff notes. For these reasons, the Motion to Compel is denied.

DEPOSITION REQUESTS

Judge Porteous requests pretrial depositions of the following ten witnesses "to elicit from these witnesses exculpatory and/or contradictory testimony concerning the House's Articles of Impeachment": Jacob Amato, Jr.; Robert Creely; Louis Marcotte, III; Lori Marcotte; Rafael Goyeneche; DeWayne Horner; Joseph Mole; Claude Lightfoot; Bobby Hamil; and Cheyenne Tackett. The House argues that under the Committee precedent depositions should only be permitted for central witnesses who have not previously testified or have refused to cooperate and that Judge Porteous's requests do not meet this standard.

The taking of pretrial deposition testimony is neither a guaranteed right of an impeached federal officer nor an established norm of Senate impeachment trial proceedings. Use of pretrial depositions in impeachment proceedings is a recent development first authorized in the 1989 Committee proceedings for the impeachment trial of Judge Alcee Hastings.² The Hastings Committee highlighted the unprecedented nature of the deposition requests and authorized only four of the sixteen requests:

In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.³

The Hastings Committee recognized that deposition testimony should be rare and subject to a demanding standard.

The Committee finds that Judge Porteous has demonstrated "a strong showing of need" for taking pretrial depositions of the following four witnesses: (1) Jacob Amato, Jr.; (2) Robert Creely; (3) Louis Marcotte, III; and (4) Lori Marcotte. First, these four witnesses were key participants in Judge Porteous's alleged pattern of corrupt conduct. These four witnesses will likely offer relevant testimony and probative evidence for the House's case and Judge Porteous's defense.

Second, although these witnesses have given some prior testimony before a federal grand jury, the Special Investigatory Committee of the Fifth Circuit Court of Appeals, and the House Impeachment Task Force that Judge Porteous may use to prepare for the Senate trial, pretrial depositions will supplement the limited opportunities for examination that he had in those proceedings. Notwithstanding the House's argument, the existence of prior witness testimony from other proceedings alone does not prohibit a witness deposition. The Hastings Committee authorized the deposition of a witness who had given testimony before the Eleventh Circuit

² There is no record of the use of pretrial depositions in the Committee impeachment trial proceedings against Judge Harry Claiborne and Judge Walter Nixon.

³ Report of the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Alcee L. Hastings, S. Hrg. 101-194, pt. 1, at 605-06 (1989).

investigatory committee because he was considered to be “especially central to [Judge Hastings’s] defense.”⁴ The Committee concludes that Mr. Amato, Mr. Creely, Mr. Marcotte, and Ms. Marcotte will likely be “especially central” witnesses in this proceeding and that their depositions will give Judge Porteous “a sufficient basis for trial preparation.”⁵

Judge Porteous has not demonstrated “a strong showing of need” for the depositions of Mr. Goyeneche, Mr. Horner, Mr. Mole, Mr. Lightfoot, Mr. Hamil, and Ms. Tackett. None of these witnesses can be deemed “especially central” to Judge Porteous’s defense. To the extent that these witnesses have relevant testimony, the existing transcripts of testimony from prior proceedings, documentary evidence already provided to Judge Porteous, and the opportunity to interview these witnesses should provide him “a sufficient basis for trial preparation.” For these reasons, the Committee denies the Motion as to Mr. Goyeneche, Mr. Horner, Mr. Mole, Mr. Lightfoot, Mr. Hamil, and Ms. Tackett.

The depositions of Mr. Amato, Mr. Creely, Mr. Marcotte, and Ms. Marcotte shall be set for August 2, 2010 in the Senate Office Buildings. The Committee hereby authorizes subpoenas to issue for these witnesses. As all four of these witnesses have given some prior testimony, each deposition shall be limited to no more than three hours. The Committee staff will issue appropriate deposition notices after subpoenas are served.

Dated: July 19, 2010



CLAIRE McCASKILL
Chairman



ORRIN G. HATCH
Vice Chairman

⁴ *Id.* at 606.

⁵ *Id.*